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PROFESSIONAL RESPONSIBILITY—ATTORNEY-CLIENT PRIVILEGE: ARE EXPECTATIONS OF PRIVACY REASONABLE FOR COMMUNICATIONS BROADCAST VIA CORDLESS OR CELLULAR TELEPHONES?

I. INTRODUCTION

The adversarial justice system of the United States has historically recognized the need to protect confidences communicated by clients to their attorneys.¹ When entrusted solely to an attorney, client confidences should be divulged by that attorney only to the extent necessary for resolution of the client's case or when disclosure is compelled by the standards of professional ethics.² Unfortunately, however, client confidences are often divulged unintentionally because the media of exchange chosen for communication are susceptible to interception and eavesdropping by persons who should not be privy to the communicate.³ This Comment analyzes only situations in which confidential communications are unknowingly disclosed because of the medium of communication and not those situations in which a lawyer knowingly or lawfully divulges client communications.⁴

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1. ABA CODE OF PROFESSIONAL ETHICS Canon 6 (1908) ("The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidences have been reposed.").
 2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1987). Maryland's Rules of Professional Conduct are set forth under Rule 1230 and are located in Appendix F to the Maryland Rules. See MD. RULE 1230.
 3. See Congressional Findings Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211 (1968) (finding that "there has been extensive wiretapping carried on without legal sanction and without the consent of any of the parties to the conversation"); Frank M. Tuerkheimer, *The Underpinnings of Privacy Protection; History of Privacy Protection Issues*, 36 COMM. OF THE ACM 69 (Aug. 1993).
 4. The Maryland Rules of Professional Conduct set forth several circumstances where an attorney may lawfully divulge client confidences. See, e.g., MD. RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1987) (regarding the duties of candor towards the tribunal which "continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"); MD. RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1987) (admonishing attorneys against making knowingly false statements to third persons of material facts or law or failing to disclose material facts to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, even if compliance requires disclosures of information protected by Rule 1.6).

In the last decade, the dramatic advances of telecommunications have enabled millions of people to communicate through a myriad of electronic media,⁵ including facsimiles, electronic mail, cordless phones, cellular car phones, and air phones. Many of these media are connected by satellites that form a communication labyrinth, evermore complex and susceptible to eavesdropping or wiretapping.⁶ Radio wave transmissions are particularly susceptible to interception by the general public through the use of commercially marketed receivers and scanners.⁷ The vulnerability of electronic communication to eavesdropping or wiretapping led to the enactment of the Electronic Communications Privacy Act of 1986 (hereinafter ECPA).⁸ The ECPA created a veil of privacy around some of the aforementioned communications. Several states have followed congressional efforts to protect the privacy of electronic communications while permitting electronic surveillance by officers of the law with prior court approval.⁹

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5. See COMM. DAILY, April 14, 1994, at 6 (citing forecast by the Hershel Shostack Association that there will be 16 million cellular phone subscribers in 1994, an increase from 11 million subscribers in 1993); Grace Casselman, *Visionaries Gather in Toronto To Shed Light on Info Highway*, 10 COMPUTER DEALER NEWS 1 (Feb. 1994) (referring to Eric Schmidt, C.E.O. for Sun Microsystems, Inc., who stated that there were, at that time, 20 million on-line users for the Internet computer network).
 6. See generally JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1995).
 7. See *infra* Part III.
 8. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, §§ 101-303, 100 Stat. 1848 (codified at 18 U.S.C. §§ 1367, 2510-21, 2701-10, 3121-26) [hereinafter ECPA]. This Comment will only address the portion codified at 18 U.S.C. §§ 2510-21.
 9. The Maryland Wiretapping and Electronic Surveillance Act is codified at MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -414 (1995 & Supp. 1995) [hereinafter MWESA]. See also ALA. CODE §§ 13A-11-30 to -37 (1994); ALASKA STAT. §§ 12.37.010 to .130, 42.20.300 to .390 (Supp. 1994); ARIZ. REV. STAT. ANN. §§ 13-3004 to -3017 (1989 & Supp. 1994); ARK. CODE ANN. § 5-60-120 (Michie 1993); CAL. PENAL CODE §§ 629 to 637.2 (West 1986 & Supp. 1995); COLO. REV. STAT. ANN. §§ 16-15-101 to -104, 18-9-302 to -305 (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 53a-187 to -189, 54-41a to -41t (West 1994); DEL. CODE ANN. tit. 11, § 1336 (1987 & Supp. 1994); D.C. CODE ANN. §§ 23-541 to -556 (1989); FLA. STAT. ANN. §§ 934.01 to .10 (West 1985 & Supp. 1995); GA. CODE ANN. §§ 16-11-60 to -69 (1992 & Supp. 1995); HAW. REV. STAT. §§ 803-41 to -48 (1985 & Supp. 1992); IDAHO CODE §§ 18-6701 to -6709 (1987 & Supp. 1995); ILL. ANN. STAT. ch. 725, para. 5/108B-1 to 108B-7 (Smith-Hurd 1992 & Supp. 1995); IOWA CODE ANN. § 808B (West 1994 & Supp. 1995); KAN. STAT. ANN. §§ 22-2514 to -2518 (1988 & Supp. 1994); LA. REV. STAT. ANN. §§ 15:1302 to :1312 (West 1992 & Supp. 1995); ME. REV. STAT. ANN. tit. 15, §§ 709-713 (West 1980 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1990 & Supp. 1995); MINN. STAT. ANN. §§ 626A.01 to .13 (West 1983 & Supp. 1995); MISS. CODE ANN. §§ 41-29-501 to -537 (1993 & Supp. 1995); MO. ANN. STAT. §§ 542.400 to .422 (Vernon Supp. 1995);

To fall within the protection afforded by federal and state statutory enactments, an electronic communication must be cloaked in a reasonable expectation of privacy.¹⁰ Absent this expectation, such communications are admissible into evidence, and the liability of the attorney using this communication method may be at stake under the rules of professional ethics and general tort law.¹¹ Differences between federal and local law and different interpretations among the various federal circuits have led to a split of authority on the question of whether individuals communicating over the radio waves are entitled to a reasonable expectation of privacy in their communications.¹² Maryland courts and the United States Court of Appeals for the Fourth Circuit have not ruled on the issue of whether communications over radio waves are entitled to a reasonable expectation of privacy.

This Comment argues that attorneys should take steps to ensure that their radio wave communications are enveloped in a reasonable expectation of privacy and are protected by the attorney-client privilege. An attorney has a duty to inform his client of the evidentiary

NEB. REV. STAT. §§ 86-701 to -712 (1994); NEV. REV. STAT. ANN. §§ 179.410 to .515, 200.610 to .690 (Michie 1992); N.H. REV. STAT. ANN. §§ 570-A.1 to -.11 (1986 & Supp. 1994); N.J. STAT. ANN. §§ 2A:156A-2 to -24 (West 1985 & Supp. 1995); N.Y. CRIM. PROC. LAW § 700.20 (McKinney 1995); N.Y. PENAL LAW §§ 250.00 to .05 (McKinney 1989 & Supp. 1995); 1995 N.C. Sess. Laws 407; N.D. CENT. CODE §§ 12.1-15-01 to -04 (1985 & Supp. 1991); OHIO REV. CODE ANN. §§ 2933.51 to .66 (Baldwin 1993 & Supp. 1995); OKLA. STAT. ANN. tit. 13, §§ 176.2 to .13 (West 1994); OR. REV. STAT. §§ 133.721 to .739 (1993); 18 PA. CONS. STAT. ANN. §§ 5701-5781 (1983 & Supp. 1995); R.I. GEN. LAWS §§ 11-35-21, -24, 12-5.1-1 to -16 (1994); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -34 (1988 & Supp. 1995); TENN. CODE ANN. §§ 39-13-601 to -604, 40-6-301 to -310 (Supp. 1994); TEX. CIV. PRAC. & REM. CODE ANN. §§ 123.001 - .003 (West 1986 & Supp. 1995); TEX. PENAL CODE ANN. §§ 16.01 - .05 (West 1994); TEX. CODE CRIM. PROC. ANN. art. 18.20 (West Supp. 1995); UTAH CODE ANN. §§ 77-23a-1 to -16 (1995 & Supp. 1995); VA. CODE ANN. §§ 19.2-61 to -70.3 (Michie 1995); WASH. REV. CODE ANN. §§ 9.73.030 - .140 (West 1988 & Supp. 1995); W. VA. CODE §§ 62-1D-1 to -16 (1992 & Supp. 1995); WIS. STAT. ANN. §§ 968.27 - .33 (West 1985 & Supp. 1994); WYO. STAT. §§ 7-3-601 to -610 (1995).

10. See generally *Katz v. United States*, 389 U.S. 347, 350-52 (1967) (holding that the test concerning the privacy of communications is whether the person exhibited a reasonable expectation of privacy).
11. The Maryland Rules of Professional Conduct provide that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MD. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987). In essence, an attorney may be under a duty to inform the client of the nature of the attorney-client privilege and the need to communicate via private media. See also MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987) (stating that a "lawyer shall not reveal information relating to representation of a client"). See generally *infra* Part V.
12. See generally *infra* Part IV.

implications of radio wave communications that, although meant to be private, may be overheard by "eavesdroppers."¹³ A failure to inform a client of the possibility that radio wave communications can jeopardize evidentiary and attorney-client privileges may be grounds for malpractice actions and disciplinary sanctions.¹⁴

Part II of this Comment discusses the elements of attorney malpractice, with emphasis on the attorney's duty of confidentiality and the duty to explain matters to the client so that the client can make informed decisions regarding representation. Part III explores the nature of cordless and cellular phones, the processes by which such phones transmit communications, and the ease with which such communications can be intercepted. Part IV examines case law that has applied and interpreted wiretapping statutes around the country. Contradictory views and the bases for divergence will also be discussed. Parts II through IV of this Comment provide background for Part V, which examines case law relative to radio wave communications and applies the law to the rules of professional conduct. Part V also examines an attorney's liability, and the potential sanctions available, for failure to abide by the rules of professional conduct. Finally, Part VI proposes measures that attorneys should take to guard against exposing client confidences over radio wave communications.

II. THE ELEMENTS OF ATTORNEY MALPRACTICE

Generally, in order to succeed in a negligence action, a plaintiff must allege that the defendant's breach of a duty of care proximately caused the plaintiff to suffer a legally cognizable injury.¹⁵ To recover for attorney malpractice, however, the plaintiff must prove an additional element of privity, which is established by demonstrating the existence of the attorney-client relationship.¹⁶ An attorney's duties

13. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987) (requiring a lawyer to explain a matter to the extent reasonably necessary to obtain the client's informed consent).

14. See *infra* Parts II and V.

15. E.g., *Faya v. Almaraz*, 329 Md. 435, 448, 620 A.2d 327, 333 (1993).

16. *Flaherty v. Weinberg*, 303 Md. 116, 128, 492 A.2d 618, 624 (1985) (citing *Kendall v. Rogers*, 181 Md. 606, 612, 31 A.2d 312, 315 (1943), for the adoption of the tripartite test to determine privity which requires: "(1) the attorney's employment; (2) [the attorney's] neglect of a reasonable duty; and (3) loss to the client proximately caused by that neglect of duty"). The *Flaherty* court focused on the first element of this test, which traditionally required strict privity between the plaintiff-client and the defendant-attorney. *Id.* The *Flaherty* court noted, however, that the third party beneficiary theory is an exception to the privity requirement. *Id.* The third party beneficiary theory was first accepted in Maryland in *Prescott v. Coppage*. *Id.* at 129, 492 A.2d at 624 (citing *Prescott v. Coppage*, 266 Md. 562, 296 A.2d 150 (1972)).

toward his client can be both implied at law¹⁷ and explicitly defined by a contractual arrangement between the attorney and the client.¹⁸

Perhaps the most well known duty that an attorney owes to a client is the duty to keep attorney-client communications confidential. This duty was amended in the 1983 ABA Model Rules of Professional Conduct¹⁹ to eliminate the element of knowledge of the disclosure of confidential communications. Thus, an attorney may now breach the duty of confidentiality without even being aware of having done so.²⁰ Maryland has adopted the same rule regarding the duty of confidentiality imposed by the ABA Model Rules. In Maryland, Rule 1.6(a) of the Maryland Rules of Professional Conduct provides that an attorney "shall not reveal information relating to the representation of a client unless one of several limited exceptions applies."²¹ Although a plain reading of this rule suggests an absolute prohibition against divulging confidential communications, the Court of Appeals of Maryland recently held otherwise.²² The court of appeals held: "There must be the potential for some harm to the client's interest before an attorney will be considered . . . to be subject to discipline, for having revealed 'information relating to representation of a client.'"²³

In addition to an attorney's duty to maintain the confidentiality of client communications, an attorney also has the duty, under Rule 1.4(b), to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."²⁴ This duty places a burden upon the attorney to inform the

17. See generally MD. RULES OF PROFESSIONAL CONDUCT (1987).

18. Cf. *Prescott v. Coppage*, 266 Md. 562, 296 A.2d 150 (1972) (adopting the third party beneficiary rule for imposing the duty of reasonable care upon the attorney). See generally *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943) (requiring strict privity of contract between attorney and client before a duty to the client arises). *Wloderak v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940).

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (stating that "[a] lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation" (emphasis added)).

20. Prior to the Model Rules, the ABA ethical requirements stated that "a lawyer shall not knowingly: (1) reveal a confidence or secret of his client," thus, ignorance of an inadvertent disclosure was a defense. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1969) (emphasis added).

21. MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987).

22. *Harris v. The Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993).

23. *Id.* at 608, 625 A.2d at 946 (1993) (quoting MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987)). Thus, inadvertent or intentional disclosures of harmless client confidences will not subject an attorney to discipline. See *Harris v. The Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993). However, inadvertent disclosures of harmful confidences could subject an attorney to discipline and to liability if the client is damaged in some way. *Id.*

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987).

client that any communications with the attorney should be made under confidential circumstances. In addition, the attorney should ensure that his communications to the client are confidential within the dictates of the Maryland Rules of Professional Conduct.²⁵

A client cannot maintain an action against his attorney for a breach of the duties imposed by Rule 1.6(a) and Rule 1.4(b) unless that breach results in a legally cognizable injury.²⁶ This injury may be either the loss of a lawsuit or other legally cognizable damages; otherwise the breach of duty "would be *damnum absque injuria*" (damage absent injury).²⁷ Furthermore, for an attorney to be subject to discipline for a violation of the Rules of Professional Conduct, "[t]here must be some potential for some harm to the client's interest."²⁸ Thus, an attorney will not be subject to disciplinary action in Maryland if he intentionally or inadvertently reveals non-harmful, confidential client information.²⁹

III. THE NATURE OF CORDLESS AND CELLULAR TELECOMMUNICATIONS

A cellular or cordless telephone is a communication device that transforms sound waves into radio waves to be broadcast and transforms radio waves into sound waves to be received.³⁰ A cellular or cordless communication is transmitted on a specific frequency to a

25. See generally Joanne Pitulla, *Perils of Office Tech*, 77 A.B.A. J. 102, 102 (Oct. 1991) (noting that the Illinois State Bar Association has concluded that a client has a reasonable right to presume that a communication with his attorney is confidential).

26. See generally *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985). *Prescott v. Coppage*, 266 Md. 562, 296 A.2d 150 (1972); *Central Cab Co. v. Clarke*, 259 Md. 542, 270 A.2d 662 (1970); *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); *Wloderak v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940).

27. *Central Cab Co. v. Clarke*, 259 Md. 542, 553, 270 A.2d 662, 668 (1970) (stating that "[i]n order for a client to recover damages against an attorney for negligent conduct . . . the client must show that injury proximately resulted to the client from [the attorney's] negligent act"); see also *Kendall v. Rogers*, 181 Md. 606, 612, 31 A.2d 312, 315 (1943).

28. *Harris v. The Baltimore Sun Co.*, 330 Md. 595, 608, 625 A.2d 941, 947 (1993). In *Harris*, the Court of Appeals of Maryland held that there had to be "some potential for some harm to the client's interest before an attorney w[ould] be considered to be subject to discipline for having revealed 'information relating to representation of a client.'" *Id.* (quoting MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987)).

29. See *id.*

30. For a further discussion of cellular and cordless phone communications in technical detail, see generally K. FUJIMATO & J.R. JAMES, *MOBILE ANTENNA SYSTEMS HANDBOOK*, 17-365 (1994); WILLIAM GOSLING, *RADIO RECEIVERS*, 264-84 (1986); and RAYMOND C.V. MACARIO, *CELLULAR RADIO-PRINCIPLES AND DESIGN* (1993).

receiver supplied by the telephone company which, in turn, transmits the signal via a land-based line to a regular phone.³¹ In reverse, the transmission from a regular phone to the telephone company's transmitter is broadcast via radio waves to the original cellular or cordless telephone. Transmissions are said to be "in the clear" when no attempt is made to encrypt, scramble, or distort the signal from either the cellular or cordless telephone or from the transmitter.³² The essential difference between cellular and cordless phones lies in the territorial area covered by the broadcast transmissions.³³

"In the clear" transmissions are readily audible to any person with a radio receiver within the area of the transmission's broadcast, if the transmission's frequency is within the scope of the radio receiver frequencies.³⁴ A tuning device within the receiver searches for active frequencies within its range and focuses on the specific frequencies used by unsuspecting callers.³⁵ Some radio receivers may be limited to a certain range of frequencies such as AM only or AM and FM commercial radio stations.³⁶ Other receivers may have the capability of accessing the full spectrum of radio waves, thus enabling the receipt of thousands of signals including police, fire, railroad, ambulance, aircraft, marine, citizens band, and cellular and cordless telephone broadcasts.³⁷ In essence, the user of a cellular or cordless

31. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

32. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

33. To scan a cordless phone communication, a receiver must be within 300 feet of the transmission. Victor Dricks, *Eavesdroppers Find Cordless Phones To Be Easy Targets; Arrests in Alleged Murder Plot Prove Lack of Privacy*, THE PHOENIX GAZETTE, Mar. 11, 1993, at A1 (stating that cordless phone communications can be heard up to one-half-mile away from the transmission or up to a mile with advanced antennas); see also *Mozo v. State* 632 So. 2d 623, 626 (Fla. Dist. Ct. App. 1994) (observing that cordless phone signals may be intercepted within a range of 1000 feet). The cellular phone industry transmits phone calls via transmitters centered in hexagonal cells arranged in a beehive matrix across the United States. A typical cell radius for cellular communications extends between 2 kilometers for high density areas and up to 20 kilometers for rural areas. However, the broadcast transmission from either a user's car or the phone company's transmitter usually extends beyond the size of the cell, because the cell's radius is set at the optimal distance from the transmitter/receiver rather than at the outer limits of the transmission. FUJIMATO & JAMES, *supra* note 30, at 149; MACARIO, *supra* note 30, at 7-8.

34. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

35. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

36. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

37. See FUJIMATO & JAMES, *supra* note 30; GOSLING, *supra* note 30; MACARIO, *supra* note 30.

telephone is effectively a mobile amateur radio station in nearly every respect except that the user is limited in the scope of frequencies that he may broadcast and receive.³⁸

Once a broadcast transmission of a conversation is converted into radio waves, that transmission may be heard by any other receivers in the broadcast area capable of tuning into that transmission's frequency. During the 1980s and early 1990s, receivers were commercially marketed throughout the United States.³⁹ Due to the increasing use of these receivers to intercept cellular phone conversations, Congress required the Federal Communications Commission to prescribe regulations banning the manufacture and sale of such receivers.⁴⁰ These regulations, however, do not prevent the lawful use of scanners already owned by the millions who listen to radio wave communications.⁴¹

IV. ELECTRONIC COMMUNICATIONS LAW

A fundamental part of the law relating to the attorney-client relationship requires communications between the attorney and client to be shrouded in a reasonable expectation of privacy.⁴² Stated otherwise, the attorney-client privilege "is limited to those communications which the client either expressly made confidential or which

38. *Edwards v. Bardwell*, 632 F. Supp. 584, 586-87 (M.D. La.), *aff'd*, 808 F.2d 54 (5th Cir. 1986); *see, e.g.,* MACARIO, *supra* note 30.

39. Dricks, *supra* note 33, at A1 (estimating that 10 million radio hobbyists routinely eavesdrop on cellular and cordless communications).

40. *See* 47 U.S.C. § 302a(d) (Supp. 1993), which states:

(1) Within 180 days after October 28, 1992, the Commission shall prescribe and make effective regulations denying equipment authorization . . . for any scanning receiver that is capable of—

(A) receiving transmissions in the frequencies allocated to the domestic cellular radio telecommunications service,

(B) readily being altered by the user to receive transmissions in such frequencies, or

(C) being equipped with decoders that convert digital cellular transmissions to analog voice audio.

(2) Beginning 1 year after the effective date of the regulations adopted . . . , no receiver having [such] capabilities . . . shall be manufactured in the United States or imported for use in the United States.

47 U.S.C. § 302a(d).

41. *See* Dricks, *supra* note 33, at A1.

42. *See generally* *Katz v. United States*, 389 U.S. 347 (1967). In federal courts, the attorney-client privilege is "governed by the principles of the common law" developed by the courts. FED. R. EVID. 501. In state cases, and in federal civil cases sitting in diversity, state law supplies the rules of decision regarding the establishment of a confidential privilege. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

he could reasonably assume under the circumstances would be understood by the attorney as so intended.”⁴³ Although a client may assume that his attorney understands the client’s desire for confidentiality, the lack of a *reasonable* expectation of privacy surrounding radio wave communications may, in fact, prevent the privilege from attaching. The following parts of this Comment examine the statutory and case law of various jurisdictions that have addressed whether a reasonable expectation of privacy surrounds cordless and cellular communications.

A. Federal Law

In 1986, the United States Congress comprehensively overhauled federal wiretap law with the enactment of the ECPA,⁴⁴ which was designed to protect and secure the privacy of wire and oral communications between individuals.⁴⁵ Among other things, the ECPA prohibits the willful interception or willful use of “wire” or “oral” communications.⁴⁶ Although the interception of all wire communications is prohibited by the ECPA, interception of oral communications is only prohibited if made under circumstances justifying an expectation of privacy.⁴⁷

The federal circuits are divided as to whether communications on cellular or cordless telephones fall within the definitions of “oral”

43. 1 JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 91, at 333 (4th ed. 1992).

44. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, §§ 101-303, 100 Stat. 1848 (codified at 18 U.S.C. §§ 1367, 2510-21, 2701-10, 3121-26).

45. *Edwards*, 632 F. Supp. at 587; Congressional Findings Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211-12 (1968) (observing that wire communications form an interstate network susceptible to substantial eavesdropping and interception of wire, electronic, and oral communications; the purpose of the ECPA is to protect the privacy of such communications).

46. The ECPA defines wire and oral communications as follows:

(1) “wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications

. . . .
(2) “oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

18 U.S.C. § 2510(1)-(2) (1995).

47. *Edwards*, 632 F. Supp. at 587.

or "wire" communications provided by federal statute.⁴⁸ In *United States v. Hall*,⁴⁹ the United States Court of Appeals for the Ninth Circuit held that a communication was protected as a "wire" communication if one party was on a cellular car phone and the other on a land-based line.⁵⁰ The *Hall* court's decision was based on its interpretation of Congress's intent in enacting the federal wiretap statute.⁵¹ In addition, the *Hall* court held that whether there was a reasonable expectation of privacy in a conversation where both parties were using radio telephones required a factual inquiry by the trial judge, and, thus, the court of appeals remanded the case.⁵² Since then, other federal courts have disregarded the *Hall* court's "one party" view and have even declared the Ninth Circuit's holding "absurd."⁵³

The majority of federal courts now hold that there is no expectation of privacy in radio wave communications, whether one or both of the parties communicate by a cordless or cellular telephone.⁵⁴

48. See *infra* notes 49-59 and accompanying text. The United States Court of Appeals for the Fourth Circuit has yet to address this issue.

49. 488 F.2d 193 (9th Cir. 1973).

50. *Id.* In *Hall*, the Arizona Department of Public Safety (DPS) was informed of suspicious conversations overheard by a Tucson housewife on her eight band, 150-170 megacycle radio. *Id.* at 194. DPS subsequently began its own monitoring of the defendants' cordless phone conversations. *Id.* Three men who were convicted of possession of marijuana with intent to distribute appealed their convictions on the grounds that the warrantless search of their cordless phone conversations conducted by the DPS violated 18 U.S.C. § 2510, which was overhauled in 1986 by the EPCA. *Id.* at 193. The convictions were overturned by the Ninth Circuit, which concluded that communications from a wireless telephone to a land-based line were wire communications and afforded the full protection of 18 U.S.C. § 2510. *Id.* at 198-99. The case was remanded to determine whether the conversations were oral or wire communications and, if oral, whether the parties had a reasonable expectation of privacy sufficient for protection under the statute. *Id.* at 199.

51. *Id.* at 196-98 (stating that "we have closely examined the legislative history of Title III and have found no indication of how Congress intended to treat a radio-telephone conversation. In the absence of such an indication, we must conclude that, if the conversation involves a land-line telephone, it is a wire communication") (footnotes omitted).

52. *Id.* at 198. The *Hall* court noted that the trial "judge made a specific finding that Hall and Nichols knew they could be heard by other people and had no right of privacy." *Id.*

53. *Edwards v. Bardwell*, 632 F. Supp. 584, 589 (M.D. La.) ("Surely the Congress did not intend such an absurd result."), *aff'd*, 808 F.2d 54 (5th Cir. 1986).

54. *Id.*; see also *United States v. Smith*, 978 F.2d 171, 180 (5th Cir. 1992) (holding that the defendant failed to prove that his expectation of privacy in a cordless phone conversation was reasonable under the Fourth Amendment; the court opined in dicta, however, that a more technologically advanced cordless phone may acquire a societal recognition of a reasonable expectation of privacy sufficient for Fourth Amendment protection), *cert. denied*, 113 S. Ct. 1620

*Edwards v. Bardwell*⁵⁵ is illustrative of the view of a majority of the federal circuits. In *Edwards*, a cordless phone communication between the criminal defendant, Edwards, and his attorney, was intercepted by an unnamed informant and was turned over to the United States District Attorney, Stanford O. Bardwell.⁵⁶ Although Edwards sued Bardwell and the informant in a civil action alleging violations of the ECPA, he lost on summary judgment on the grounds that the ECPA did not protect his cellular communications.⁵⁷ The *Edwards* court, however, did order that the contents of the communication be placed under seal, reasoning that the contents "should be maintained as confidential"⁵⁸ even though the court noted that the communication may or may not have qualified as a privileged communication "because of the method used to broadcast it."⁵⁹

B. State Law

At least forty-two state legislatures have enacted wiretap laws that are based upon the federal ECPA.⁶⁰ At present, the appellate

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- (1993), *Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990). In *Tyler*, a cordless phone conversation to an unknown receiver was intercepted by one of Tyler's neighbors. *Id.* at 705. Information heard during the interception subsequently provided the basis for the ensuing criminal charges against Tyler. *Id.* at 706. Although Tyler sued his neighbor for civil violations of the ECPA, the United States Court of Appeals for the Eighth Circuit affirmed the summary judgment against Tyler. *Id.* at 707; *see also* *United States v. Hoffa*, 436 F.2d 1243, 1247 (7th Cir. 1970) (communicating via a cellular car phone provides no reasonable expectation of privacy), *cert. denied*, 400 U.S. 1000 (1971); *United States v. Carr*, 805 F. Supp. 1266 (E.D.N.C. 1992) (holding that there is no reasonable expectation of privacy in communications via at least one cordless phone and either a cordless or land-based line).
55. 632 F. Supp. 584 (M.D. La.), *aff'd*, 808 F.2d 54 (5th Cir. 1986).
56. *Id.* at 585.
57. *Id.*
58. *Id.* at 589-90.
59. *Id.* at 589.
60. *See* ALA. CODE §§ 13A-11-30 to -37 (1994); ALASKA STAT. §§ 12.37.010 to .130, 42.20.300 to .390 (Supp. 1994); ARIZ. REV. STAT. ANN. §§ 13-3004 to -3017 (1989 & Supp. 1994); ARK. CODE ANN. § 5-60-120 (Michie 1993); CAL. PENAL CODE §§ 629 to 637.2 (West 1986 & Supp. 1995); COLO. REV. STAT. ANN. §§ 16-15-101 to -104, 18-9-302 to -305 (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 53a-187 to -189, 54-41a to -41t (West 1994); DEL. CODE ANN. tit. 11, § 1336 (1987 & Supp. 1994); D.C. CODE ANN. §§ 23-541 to -556 (1989); FLA. STAT. ANN. §§ 934.01 to .10 (West 1985 & Supp. 1995); GA. CODE ANN. §§ 16-11-60 to -69 (1992 & Supp. 1995); HAW. REV. STAT. §§ 803-41 to -48 (1985 & Supp. 1992); IDAHO CODE §§ 18-6701 to -6709 (1987 & Supp. 1995); ILL. ANN. STAT. ch. 725, para. 5/108B-1 to 108B-7 (Smith-Hurd 1992 & Supp. 1995); IOWA CODE ANN. § 808B (West 1994 & Supp. 1995); KAN. STAT. ANN. §§ 22-2514 to -2518 (1988 & Supp. 1994); LA. REV. STAT. ANN.

courts in six of these jurisdictions have confronted the issue of whether recorded cellular or cordless communications are admissible into evidence; four of these jurisdictions have followed the majority of the federal circuits and have held such conversations admissible.⁶¹

In *Salmon v. State*,⁶² the Georgia Court of Appeals followed the majority of the federal circuits. The case involved a defendant

§§ 15:1302 to :1312 (West 1992 & Supp. 1995); ME. REV. STAT. ANN. tit. 15, §§ 709 - 713 (West 1980 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1990 & Supp. 1995); MINN. STAT. ANN. §§ 626A.01 to .13 (West 1983 & Supp. 1995); MISS. CODE ANN. §§ 41-29-501 to -537 (1993 & Supp. 1995); MO. ANN. STAT. §§ 542.400 to .422 (Vernon Supp. 1995); NEB. REV. STAT. §§ 86-701 to -712 (1994); NEV. REV. STAT. ANN. §§ 179.410 to .515, 200.610 to .690 (Michie 1992); N.H. REV. STAT. ANN. §§ 570-A.1 to -.11 (1986 & Supp. 1994); N.J. STAT. ANN. §§ 2A:156A-2 to -24 (West 1985 & Supp. 1995); N.Y. CRIM. PROC. LAW § 700.20 (McKinney 1995); N.Y. PENAL LAW §§ 250.00 to .05 (McKinney 1989 & Supp. 1995); 1995 N.C. Sess. Laws 407; N.D. CENT. CODE §§ 12.1-15-01 to -04 (1985 & Supp. 1991); OHIO REV. CODE ANN. §§ 2933.51 to .66 (Baldwin 1993 & Supp. 1995); OKLA. STAT. ANN. tit. 13, §§ 176.2 to .13 (West 1994); OR. REV. STAT. §§ 133.721 to .739 (1993); 18 PA. CONS. STAT. ANN. §§ 5701-5781 (1983 & Supp. 1995); R.I. GEN. LAWS §§ 11-35-21, -24, 12-5.1-1 to -16 (1994); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -34 (1988 & Supp. 1995); TENN. CODE ANN. §§ 39-13-601 to -604, 40-6-301 to -310 (Supp. 1994); TEX. CIV. PRAC. & REM. CODE ANN. § 123.001 - .003 (West 1986 & Supp. 1995); TEX. PENAL CODE ANN. §§ 16.01 - .05 (West 1994); TEX. CODE CRIM. PROC. ANN. art. 18.20 (West Supp. 1995); UTAH CODE ANN. §§ 77-23a-1 to -16 (1995 & Supp. 1995); VA. CODE ANN. §§ 19.2-61 to -70.3 (Michie 1995); WASH. REV. CODE ANN. §§ 9.73.030 - .140 (West 1988 & Supp. 1995); W. VA. CODE §§ 62-1D-1 to -16 (1992 & Supp. 1995); WIS. STAT. ANN. §§ 968.27 - .33 (West 1985 & Supp. 1994); WYO. STAT. §§ 7-3-601 to -610 (1995).

61. Compare *Salmon v. State*, 426 S.E.2d 160, 162 (Ga. Ct. App. 1992) (holding that a recording via cellular telephone to land-based line by radio receiver is permissible); *People v. Wilson*, 554 N.E.2d 545, 552 (Ill. App. Ct. 1990) (holding that a recording of a conversation on two mobile car phones overheard by anonymous informant is admissible as evidence in subsequent murder trial), *appeal denied*, 561 N.E.2d 705 (Ill. 1990); *State v. Howard*, 679 P.2d 197, 206 (Kan. 1984) (holding that recording a cordless telephone conversation, made to unknown location by radio receiver, is permissible) and *State v. Smith*, 438 N.W.2d 571, 573 (Wis. 1989) (holding that a recording via cordless telephone to unknown locations by radio scanner is permissible) with *Mozo v. State*, 632 So. 2d 623, 631-32 (Fla. Dist. Ct. App. 1994) (holding that a recording of a cordless telephone conversation by a police officer violated Article I, sections 12 and 23, of the Florida State Constitution, which accords explicit protection for private communications) and *State v. Fata*, 559 N.Y.S.2d 348, 351 (N.Y. App. Div.) (holding that the interception and subsequent recording of a cordless telephone conversation violated New York's eavesdropping statute, which intended greater protection for the privacy of cordless communications than that given by the ECPA), *appeal denied*, 565 N.E.2d 523 (N.Y. 1990).

62. 426 S.E.2d 160 (Ga. Ct. App. 1992).

who recorded a police officer's cellular phone conversation with the defendant's drug supplier in a reverse sting operation.⁶³ The defendant attempted to use the recording to impeach the police officer's testimony.⁶⁴ The trial court suppressed the recorded conversation, finding that it violated the Georgia wiretap statute.⁶⁵ Because the *Salmon* court concluded that cellular communications were not expressly protected by the statute, it then examined whether the communications were private.⁶⁶ The court stated that the legislative intent was to protect only private communications and that cellular telephones were not private because they transmitted FM radio waves for anyone to hear.⁶⁷ The Georgia Court of Appeals held that "cellular telephone users ha[d] no justifiable expectation of privacy."⁶⁸

In contrast, in *People v. Fata*,⁶⁹ the appellate division of the New York Supreme Court held that users of cordless telephones were protected from searches and seizures under New York law, even though the users of such telephones lacked a reasonable expectation of privacy.⁷⁰ In *Fata*, an off-duty police officer overheard a cordless telephone conversation emanating from a neighboring apartment.⁷¹ Because the conversation included narcotic related jargon, the officer proceeded to record additional conversations that were turned over to the narcotics task force.⁷² Based on the recorded conversations and additional, substantial evidence, the task force obtained warrants leading to the arrest and conviction of the defendant.⁷³ The defendant appealed his conviction.⁷⁴

The *Fata* court recognized that cordless phone communications were susceptible to eavesdropping, thereby resulting in a loss of

63. *Id.* at 161.

64. *Id.*

65. *Id.* The Georgia wiretap statute provides, in part, that "[i]t shall be unlawful for: . . . (4) Any person intentionally and secretly to intercept by the use of any device, instrument or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication." GA. CODE ANN. § 16-11-62 (1992).

66. *Salmon*, 426 S.E.2d at 162.

67. *Id.*

68. *Id.*

69. 559 N.Y.S.2d 348 (N.Y. App. Div.), *appeal denied*, 565 N.E.2d 523 (N.Y. 1990).

70. *Id.* at 349-52 (holding that intentional interceptions of cordless transmissions are prohibited by New York law). Suppression of the evidence was unnecessary, however, because the defendant's arrest warrant was sufficiently supported by independent evidence; therefore, the conviction was affirmed. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

privacy.⁷⁵ Nevertheless, the *Fata* court determined that, unlike the ECPA, New York law did not require a reasonable expectation of privacy for cordless communications to be protected.⁷⁶ Rather, the New York statute prohibited the intentional interception of telephonic communications by means of any instrument or device.⁷⁷ Because the court interpreted the definition of telephonic communications to include cordless phone transmissions, the defendant's conversations were protected from interception despite the lack of privacy in his communication.⁷⁸ The *Fata* court held that the plain meaning of the statute should be interpreted to include an ordinary radio or cordless telephone from which a conversation is overheard.⁷⁹

Maryland's Wiretapping and Electronic Surveillance Act⁸⁰ [hereinafter MWESA] is an offspring of the Omnibus Crime Control and Safe Streets Act of 1968.⁸¹ Since MWESA's codification, Maryland appellate courts have not ruled on whether cordless or cellular communications are protected communications in which a reasonable expectation of privacy exists. MWESA states that, in Maryland, it is unlawful to "[w]illfully intercept . . . any wire, oral, or electronic communication;" the question is whether a cordless or cellular telephonic communication is a "wire, oral, or electronic communication."⁸²

MWESA explicitly excludes cordless communications from "wire communications" and "electronic communications."⁸³ Under MWESA, for a cordless communication to fall within the ambit of an "oral communication," the conversation must be "spoken to or by any person in *private* conversation."⁸⁴ Therefore, the issue is, as in federal and state courts, whether a reasonable expectation of privacy exists in cordless communications.⁸⁵

Due to the weight of authority against the proposition that there is a reasonable expectation of privacy in cordless communications⁸⁶

75. *Id.*

76. *Id.* at 351.

77. *Id.*

78. *Id.*

79. *Id.*

80. MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -414 (1995).

81. Pub. L. No. 90-351, § 802, Stat. 212 (1968). *See generally* State v. Bailey, 289 Md. 143, 151, 422 A.2d 1021, 1026 (1980).

82. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1).

83. *Id.* § 10-401(1)(iii). As stated therein, a "[w]ire communication" does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." *Id.* Similarly, an "electronic communication" does not include: "1. The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." *Id.* § 10-401(1)(ii).

84. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (emphasis added).

85. *See supra* Part IV. A., B.

86. *See supra* note 54.

and the General Assembly's specific exclusion of cordless phones from "wire" and "electronic communications,"⁸⁷ it should follow that Maryland courts will strictly construe MWESA and leave cordless communications without a protective umbrella of privacy. Thus, cordless communications will likely be susceptible to warrantless searches and eavesdropping.

MWESA is less clear regarding cellular communications. MWESA permits the interception of electronic communications that are "*readily accessible to the general public*"⁸⁸ and the interception of "any radio communication that is transmitted . . . [b]y a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services."⁸⁹ To be "[r]eadily accessible to the general public . . . with respect to a radio communication," the communication must not be scrambled, encrypted or "[t]ransmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of the communication."⁹⁰ Because cellular telephones transmit via radio waves and, generally, do not have scrambling or encryption devices, communications transmitted to or from cellular phones seem to be left out of the scope of protection granted by the Maryland General Assembly.⁹¹

V. APPLYING CASE LAW TO THE RULES OF PROFESSIONAL RESPONSIBILITY

Because the majority of jurisdictions have held that there is no reasonable expectation of privacy in radio wave communications,⁹² attorneys must be wary of the vulnerability of cellular or cordless communications with their clients. Inasmuch as the Model Rules require an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"⁹³ the burden falls upon the attorney to inform the client of the vulnerability of communications across cordless or cellular phones.⁹⁴ A failure to inform the client of the vulnerabilities

87. See *supra* note 83 and accompanying text.

88. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(7)(i)-(ii) (emphasis added).

89. *Id.*

90. *Id.* § 10-401(15)(i)-(ii).

91. See *infra* Part VI (concerning suggestions for encryption, scrambling, and other methods of ensuring the privacy of cellular communications).

92. See *supra* note 54.

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987).

94. Joanne Pitulla, *Perils of Office Tech*, 77 A.B.A. J. 102 (Oct. 1991) (observing the conclusion of the Illinois State Bar Association that a client has a reasonable right to presume that a communication with his attorney is confidential).

of radio wave communications could result in the destruction of the attorney-client privilege, depending upon the jurisdiction in which the attorney practices.⁹⁵ If a client's conviction or the loss of a case turns on the revelation of radio wave communications with his attorney, the attorney may be liable for malpractice by breaching his duty of confidentiality⁹⁶ or by failing to inform the client of the vulnerability of the communication.⁹⁷ Additionally, the attorney may be subjected to a disciplinary hearing before the grievance commission of the respective jurisdiction, which might ultimately result in the attorney's reprimand, suspension, or disbarment.⁹⁸

95. See *Edwards v. Bardwell*, 632 F. Supp. 584, 589 (M.D. La.), *aff'd*, 808 F.2d 54 (5th Cir. 1986).

96. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1987).

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983); MD. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987); see *supra* Part III; ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 7.2 (1986) (providing for an attorney's suspension if the attorney knowingly violates a professional duty causing injury or potential injury to the attorney's client); Standard 4.2 (providing for attorney's reprimand where the attorney negligently violates a professional duty).

98. The standard by which sanctions are levied against an attorney for misconduct are as follows:

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0 ('the duty violated; the lawyer's mental state; and the actual or potential injury caused by the lawyer's misconduct; and the existence of aggravating or mitigating factors) the following sanctions are generally appropriate in cases involving the failure to preserve confidences:

4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 4.2 (1986); cf. *Harris v. The Baltimore Sun Co.*, 330 Md. 595, 608, 625 A.2d 941, 947 (1993); *supra* note 28 and accompanying text.

VI. METHODS OF PROTECTING RADIO WAVE COMMUNICATIONS

As suggested by *United States v. Smith*,⁹⁹ a more technologically advanced cordless phone may acquire a societal recognition of a reasonable expectation of privacy sufficient to afford Fourth Amendment protection.¹⁰⁰ Advancements in digital technology, which have been incorporated into the most recent generation of cellular phones, may provide cellular communication with a reasonable expectation of privacy.¹⁰¹ A second method that can be used to ensure the confidentiality of radio wave communication is to "scramble" the communications at a cost of approximately \$600 per scrambling device.¹⁰² The Massachusetts Bar Association is the first in the nation to offer its members discounted scrambling of cellular phone calls.¹⁰³ Finally, the most expensive, yet most effective, means of protecting radio wave communications is to use an encryption device.¹⁰⁴

VII. CONCLUSION

Due to the recent nature of cellular technology, case law deciding whether a reasonable expectation of privacy surrounds radio com-

99. 978 F.2d 171 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1620 (1993).

100. *Id.* at 180.

101. See Joia Shillingford, *Cutting the Cost of Calling - Mobile Phones*, FIN. TIMES LTD., Oct. 26, 1994, at VII; *Cellular One Introduces First Digital Voice Cellular Network in Minnesota*, PR NEWswire ASS'N, INC., Oct. 18, 1994, available in LEXIS, News Library, Curnws File ("Unlike analog, which carries voice patterns over radio waves, the digital process literally encodes a conversation into 'ones and zeros,' compresses it and sends it across the airwaves, then converts it back to sound. Therefore, digital greatly enhances the privacy of a voice channel."); *Digital Cellular Growth Picks up Speed; Sprint Goes with CDMA*, ADVANCED WIRELESS TECHNOLOGIES, Sept. 14, 1994, available in LEXIS, News Library, Curnws File (stating that digital cellular phone service "offer[s] better security against eavesdropping").

102. See James J. Harrison, Jr., *Plugging Cellular Leaks*, THE RECORDER, July 9, 1993, at 6. Harrison notes that many scrambling devices require the party to whom the call has been placed to have a de-scrambler. *Id.*; *Service to Block Eavesdropping on Cellular Phones*, N.Y. TIMES, Apr. 28, 1993, at D4 (Estimates on cellular scrambler devices would be \$600 with "\$5 a month [for the service plus] 95 cents a minute, in addition to normal cellular charges.").

103. *Cycom International: Massachusetts Bar First in Nation To Scramble Members' Cellular Phone Calls*, PR NEWswire, Sept. 21, 1993, available in LEXIS, News Library, Curnws File; see Michael Causey, *Lawyers Using the Internet To Woo and Keep Customers*, DAILY REC., Nov. 12, 1994, at 13 (noting that "Massachusetts is generally recognized as a state leader in promoting Internet use").

104. See generally James J. Harrison, Jr., *Plugging Cellular Leaks*, THE RECORDER, July 9, 1993, at 6 (noting that encryption devices, such as the Motorola Secure Telephone Unit-III, cost \$2000 to \$3000 per unit); Dan Seeney, *The Wages of Fear: Marketing Cellular Encryption*, CELLULAR BUS., Dec. 1992, available in LEXIS, News Library, Curnws Files (providing a general, yet complete, overview of available security measures which may be taken by cellular phone users, including encryption).

munications is scarce and is silent as to whether an attorney may be subject to malpractice or disciplinary action for inadvertent disclosures of confidential information. Nonetheless, an attorney should strive not only to maintain the minimum standards of the profession imposed by the Rules of Professional Responsibility but should also take the precautions necessary to protect the attorney-client privilege and all confidences and secrets entrusted to him. Attorneys should advise their clients to communicate via land-based lines of communication. Land-based lines clearly fall within the protection of the ECPA and MWESA, thus creating a reasonable expectation of privacy in such communications.

Alternatively, as suggested by the Maryland Wiretapping and Electronic Surveillance Act,¹⁰⁵ an attorney may also wish to scramble or encrypt his client communications in an effort to preserve the privacy of the communications. These additional precautions will protect the attorney from potential sanctions, liability, and the loss of clients. The cost of these precautions seems a small price to pay when weighed against the severity of the consequences of an intercepted phone call between an attorney and a client.

Anthony S. Higgins

105. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1).